(6)

No. 95-559



IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

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DOCTOR'S ASSOCIATES, INC. and NICK LOMBARDI,
*Petitioners,*

v.

PAUL CASAROTTO, ET UX.,
*Respondents.*

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**On Writ of Certiorari to the Supreme Court of Montana**

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## BRIEF FOR PETITIONERS

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## QUESTION PRESENTED

Whether Section 2 of the Federal Arbitration Act (9 U.S.C. § 2)—which makes written agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"—preempts a state law that makes agreements to arbitrate, but not other agreements, unenforceable unless a specific notice of the arbitration agreement is placed on the first page of the contract.

## STATEMENT PURSUANT TO RULE 24.1(b)

Daniel L. Hudson, Deb Hudson, and D&D Subway Corporation are parties to the proceedings in the Montana Eighth Judicial District Court. They were not parties to the appeal in the Supreme Court of Montana and are omitted from the caption in this Court.

The list required by Rule 29.6 can be found on page ii of the Petition for a Writ of Certiorari.

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**On Writ of Certiorari to the Supreme Court of Montana**

## BRIEF FOR PETITIONERS

## OPINIONS BELOW

The opinion of the Supreme Court of Montana is reported at 901 P.2d 596. The prior opinion of the Montana Supreme Court in this case is reported at 268 Mont. 369, 886 P.2d 931. Both opinions are reprinted in full in the Joint Appendix at 48-59 and 12-47, respectively. The earlier opinion was vacated by this Court in an order reported at 115 S. Ct. 2552. The order of the Montana Eighth Judicial District Court is not reported but is reprinted in full in the Joint Appendix at 10-11.

## JURISDICTION

The Supreme Court of Montana entered judgment on August 31, 1995. The petition for a writ of certiorari was filed on October 2, 1995, and was granted on January 5, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> **Validity, irrevocability, and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 27-5-114(4), Montana Code Annotated, provides:

> Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.

The full text of Section 27-5-114, which governs the validity of arbitration agreements under Montana law, is set out in an appendix to this brief.

## STATEMENT

This case arises from the refusal of the Montana Supreme Court to enforce an agreement by the parties to arbitrate their disputes. The court did not reach that result because the parties had failed to comply with the requirements under federal law for enforcing an agreement to arbitrate. Quite the opposite. It is undisputed that the parties' agreement to arbitrate met every requirement of Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, which makes written arbitration



agreements involving interstate commerce "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Nevertheless, the Montana Supreme Court held that the agreement was unenforceable because it did not comply with a state law—applicable only to arbitration agreements—that invalidates agreements to arbitrate unless notice that a contract is subject to arbitration is typed in underlined capital letters on the first page of the contract. *See* Mont. Code Ann. § 27-5-114(4) (1995). In so doing, the court rejected Petitioners' argument that the notice requirement is preempted by Section 2 of the FAA. App. 21-28.

Petitioner Doctor's Associates, Inc. ("DAI") is the national and international franchisor of "Subway" sandwich shops. App. 83; *see* App. 10. At the time of this dispute, DAI had sold a total of over 8,500 Subway franchises throughout the United States. App. 84. Today, Subway has sold more than 10,000 franchises nationwide. Petitioner Nick Lombardi is DAI's Development Agent in Montana. *See* App. 13. During the events in question, DAI was a Connecticut corporation with its principal place of business in Milford, Connecticut. App. 84.

In April 1988, DAI entered into a franchise agreement with Paul Casarotto, which permitted Casarotto to open a Subway sandwich shop in Montana. App. 64-78.[1] The franchise agreement was a standard contract that DAI used with all its franchisees throughout the United States. The agreement authorized Casarotto to operate a Subway sandwich shop and granted him a license to use DAI's federally-registered "SUBWAY" trademarks and service marks. App. 65. It also contained an express arbitration clause providing that "[a]ny controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accord-

[1] Two months later, he traveled to DAI's headquarters in Connecticut to attend training sessions for new franchisees. App. 87.

ance with the Commercial Arbitration Rules of the American Arbitration Association." App. 75.[2] Another section of the franchise agreement stated that "[t]his Agreement shall be governed by and construed in accordance with the laws of the State of Connecticut." App. 77. Just above the signature block, the agreement provided: "Each of the parties hereto acknowledges that he has read and understands this Agreement and consents to be bound by all of its terms and conditions." App. 78.[3]

When a dispute later arose, Casarotto ignored the agreement to arbitrate and filed an action against DAI,

[2] The full text of the arbitration clause (App. 75) provides as follows:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. The cost of such a proceeding will be borne equally by the parties.

[3] Paul Casarotto filed an affidavit in the Montana state district court, averring that "I read the agreement over before I signed it," although he goes on to state that "no one ever told or explained to me that the agreement contained an arbitration clause or that the agreement was to be interpreted according to the laws of the State of Connecticut." App. 87. DAI also provided Casarotto a detailed franchise offering circular that contained the following statement on the first page: "READ ALL OF YOUR CONTRACT CAREFULLY. BUYING FRANCHISE [sic] IS A COMPLICATED INVESTMENT. TAKE YOUR TIME TO DECIDE. IF POSSIBLE, SHOW YOUR CONTRACT AND THIS INFORMATION TO AN ADVISOR, SUCH AS A LAWYER OR AN ACCOUNTANT." App. 62. The offering circular stated that the franchise agreement provided for binding arbitration of any claim of breach of the agreement in accordance with the Commercial Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, with costs to be borne equally by the parties. App. 63.



Lombardi and others in the Montana Eighth Judicial District Court, Cascade County.[4] The suit alleged that Casarotto had entered into the franchise agreement and had opened a Subway store on the west side of Great Falls in reliance on representations of DAI and Lombardi that he would have an exclusive right to open another store in a different part of town when that location became available. Casarotto claimed that, contrary to his understanding with DAI and Lombardi, they had awarded the other location to another franchisee and that they had interfered with efforts to sell his store. The complaint asserted state-law contract, tort and statutory claims against DAI and Lombardi. Amended Verified Complaint, filed Nov. 4, 1992; *see* App. 13-14.

Citing the arbitration provisions in the franchise agreement, DAI and Lombardi moved in the state district court to dismiss or stay the lawsuit pending arbitration. They argued that Section 2 of the FAA required arbitration of the claims; that the FAA preempted state laws that impede enforcement of any agreement to arbitrate; and that, to the extent state law was even relevant, Montana law was inapplicable because the contract specified the parties' choice of Connecticut law, under which the agreement to arbitrate was enforceable. *See* App. 15. DAI also filed with the American Arbitration Association a Demand for Arbitration of Casarotto's claims. App. 79-82; *see* App. 11.

[4] The suit named Paul Casarotto and his wife, Pamela Casarotto, as plaintiffs. Paul and Pamela Casarotto asserted claims against defendants other than DAI and Lombardi with whom they did not have an arbitration agreement. Those claims were not the subject of the opinions and orders below. With respect to the claims asserted against DAI and against Lombardi as DAI's Development Agent, only Paul Casarotto had entered into the franchise agreement, and it is clear from the complaint that only he, and not his wife, is asserting claims against DAI and Lombardi. *See* Amended Verified Complaint, filed Nov. 4, 1992, Counts 9, 11 and 13. However, the opinions below referred to the plaintiffs in the plural and treated both plaintiffs alike.

The Montana district court granted Petitioners' motion to stay the lawsuit as against them pending arbitration. The court found that the parties' franchise agreement involved interstate commerce within the meaning of Section 2, that the agreement's arbitration clause encompassed the claims against DAI and Lombardi, and that DAI had properly demanded arbitration of those claims. Accordingly, the court stayed the litigation against DAI and Lombardi "until the arbitration has been had in accordance with the terms of the arbitration agreement." App. 10-11.

The Montana Supreme Court reversed. The court did not question that the arbitration agreement met all the requirements of federal law. The court also left undisturbed the district court's rulings that the agreement involved interstate commerce and covered the claims against DAI and Lombardi, and that DAI's arbitration demand complied with the agreement. The Montana Supreme Court nonetheless refused to enforce the arbitration agreement because it did not comply with a provision of Montana's arbitration act, *see* Mont. Code Ann. § 27-5-114(4) (1995), which makes an arbitration agreement unenforceable unless the contract containing that agreement also contains a notice, in underlined capital letters on its first page, that it is subject to arbitration. The Montana statute, by its terms and as interpreted by the Montana Supreme Court (App. 20-21), affects the enforceability of arbitration agreements but not other types of contracts.

The decision of the Montana Supreme Court not to enforce the agreement to arbitrate proceeded in several steps. First, before reaching the question whether the FAA preempts state arbitration law, the court determined that it would apply Montana law to the franchise agreement. Although the parties had explicitly provided in their contract that it would be construed in accordance with Connecticut law, the Montana Supreme Court rejected that selection and ruled that Montana law governed,



reasoning that the state's arbitration notice statute (which has no counterpart in Connecticut law) embodied a fundamental public policy that could not be thwarted by the parties' choice of a different state's law.[5] According to the court, the public policy of requiring notice of a contractual arbitration clause reflected state legislative concerns that Montanans receive sufficient notice before agreeing to a dispute resolution method that was potentially inconvenient, expensive and devoid of the procedural safeguards of a judicial proceeding. App. 20-21.

Having decided that the parties' contract was governed by Montana law, and because the contract did not contain the notice required by Montana law, the Montana Supreme Court next considered whether the FAA preempted Montana's arbitration notice statute. The court acknowledged decisions of this Court holding that Section 2 of the FAA created federal substantive law binding on the states on the issue of the enforceability of arbitration agreements, App. 21-23, but interpreted *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), as retreating from earlier authority by allowing courts to deny enforcement of arbitration agreements based on state arbitration laws so long as those laws do not "undermine the goals and policies of the FAA." App. 24-26. The court declined to follow decisions by several federal courts of appeals and one state supreme court that had held similar state notice requirements preempted by the FAA, because those decisions either preceded *Volt* or, according to the Montana court, contained little or no reference to *Volt*. App. 27.

The Montana court thus concluded that "we must rely on our own analysis of whether Montana's notice require-

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[5] Connecticut law is virtually identical to the FAA in the conditions it imposes for enforcing agreements to arbitrate. *See* Conn. Gen. Stat. § 52-408 (1995).

ment undermines the goals and policies of the FAA." App. 27. The court observed that a notice statute ensuring that parties had "knowingly" entered into an arbitration agreement was consistent with the policies underlying the FAA, and therefore was not preempted, because "the FAA does not require parties to arbitrate when they have not agreed to do so." App. 27. The court thus held that the agreement to arbitrate, but no other term of the franchise agreement, was unenforceable.[6]

Last Term, this Court vacated the judgment of the Montana Supreme Court and remanded the case for further consideration in light of *Allied-Bruce Terminix Companies v. Dobson*, 115 S. Ct. 834 (1995), which had been decided after the Montana court rendered its decision. *Doctor's Associates, Inc. v. Casarotto*, 115 S. Ct. 2552 (1995). The Montana Supreme Court ignored Petitioners' request to brief and argue the issues on remand, App. 57 (Gray, J., dissenting), and, on August 31, 1995, it "reaffirm[ed] and reinstate[d]" the December 1994 opinion that this Court had vacated. App. 54.

In its decision on remand, the Montana Supreme Court first summarized its prior opinion, emphasizing again that its decision was based on an analysis of *Volt* that preemption is determined by whether the notice statute undermines the goals and policies of the FAA. App. 57. The court then observed that, because this case did not involve a "state law which made arbitration agreements invalid and unenforceable," and because the parties' agreement indisputably involved interstate commerce, "we can find nothing in the [*Terminix*] decision which relates to the issues presented to this Court in this case." App. 53. In

[6] The author of the court's opinion also wrote separately to express his "personal observation" that federal appellate judges had unnecessarily and inappropriately deprived individuals of access to a system of justice available only in the courts. App. 29-33. Three of the seven Justices on the Montana Supreme Court dissented from the court's opinion. App. 34-47.



particular, the court saw nothing in *Terminix* that required it to modify its analysis of *Volt* "that state law is only preempted to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" App. 54 (quoting *Volt*, 489 U.S. at 477).

Chastising the majority for what they believed was an "arrogant and cavalier approach to this important case on remand from the United States Supreme Court," three of the court's seven Justices dissented on the basis that the majority had misread *Volt* and that *Terminix* had reaffirmed the supremacy of the FAA on the issue of enforceability of agreements to arbitrate. App. 57-58. The dissent took sharp exception to the majority's rush to decision without even the benefit of briefs or argument, and it concluded that "one must assume that the Court is simply unwilling to consider any analysis that would require a change in the result it remains determined to reach." App. 57.

## SUMMARY OF ARGUMENT

Section 2 of the Federal Arbitration Act provides that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). There is no question here that the parties agreed to arbitrate any disputes between them and no question that the agreement, which involved interstate commerce, is within the bounds of Section 2. Nevertheless, the Montana Supreme Court refused to enforce the parties' arbitration agreement for one, and only one, reason: failure to comply with a state statute requiring that notice of an agreement to arbitrate (but no other contractual term) be typed in underlined capital letters on the first page of a contract. The court thus applied Montana's public policy that was admittedly suspicious of arbitration to prohibit enforcement of the arbitration pro-

vision, but no other term, of a binding and lawful franchise agreement.

This decision is directly at odds both with the plain language of Section 2 and with the teachings of numerous decisions of this Court construing that language. Section 2 plainly commands, as a matter of federal law, that an arbitration agreement involving interstate commerce be enforced, subject to only one limitation: "save upon such grounds as exist . . . for the revocation of any contract." 9 U.S.C. § 2. This broad principle of enforceability embodied in Section 2 "is [not] subject to *any* additional limitations under state law." *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) (emphasis added). Moreover, this Court has repeatedly read the language of Section 2—most recently in *Terminix*—to prohibit a state from singling out agreements to arbitrate and placing them on a different "footing" from other contracts. *See Terminix*, 115 S. Ct. at 838-39, 843; *Perry v. Thomas*, 482 U.S. 483, 489-91 & 492 n.9 (1987); *Southland*, 465 U.S. at 10-16; *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983).

Yet Montana has done precisely what federal law says it may not do—impose upon arbitration agreements conditions to enforceability that do not apply to all contracts. Although the Montana Supreme Court purported to find authority for that action in *Volt*, that decision does not permit state courts to override the wishes of the contracting parties and refuse to enforce arbitration agreements on state-law grounds that are inapplicable to other types of agreements. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1215-16 (1995); *Terminix*, 115 S. Ct. at 843; *see also Volt*, 489 U.S. at 478-79. To the contrary, *Volt* makes resoundingly clear that the wishes of the parties, not any contrary wishes of state officials or judges, are controlling. Accordingly, consistent with this Court's long line of decisions construing Section 2, every federal court of appeals and state supreme court that



has considered this issue other than the Montana court, both before and after *Volt*, has held that the FAA preempts state laws conditioning enforcement of arbitration agreements on compliance with notice requirements that apply to arbitration agreements alone. *See infra* note 8.

Were the Court now to ignore the clear language of Section 2 and retreat from its own consistent construction of that language, it would effect an immediate and sweeping change in the national policy favoring arbitration—from uniform enforcement of arbitration agreements throughout the United States, to endless questions about enforceability (and inevitably contradictory answers) depending on which state's law applies and whether that state has chosen to impose conditions on enforceability that do not apply to other contracts. This concern over "permit[ting] states to override the declared policy requiring enforcement of arbitration agreements," *Southland*, 465 U.S. at 17 n.11, is not hypothetical. In addition to Montana, at least nine states—most recently, California—have enacted arbitration laws that deny enforcement of arbitration agreements solely on the basis of the parties' failure to include a specified form of notice (which differs from state to state) that their contract is subject to arbitration. *See infra* Part II. More generally, numerous states have placed a variety of conditions on enforcement of agreements to arbitrate that do not apply to contracts generally. *See id.* Taken together, these state laws stand as a direct impediment to achieving the national uniformity contemplated by Section 2, leaving those like DAI, who transact business in multiple states, subject to the vagaries of differing, even inconsistent, state arbitration laws, all contrary to Congress's express intent in enacting the FAA. *Southland*, 465 U.S. at 16.

## ARGUMENT

### I. THE FEDERAL ARBITRATION ACT PREEMPTS MONTANA'S STATUTORY RESTRICTION ON ENFORCEMENT OF ARBITRATION AGREEMENTS.

The question presented is straightforward. May Montana refuse to enforce an otherwise valid agreement to arbitrate because it does not comply with state notice requirements applicable to arbitration agreements but not to other types of agreements? The plain language of Section 2, as well as this Court's consistent reading of that language, make unmistakably clear that Montana may not. Section 2 expressly and directly preempts the application of Montana's arbitration notice statute, Mont. Code Ann. § 27-5-114(4) (1995), to agreements involving interstate commerce.

#### A. Montana's Arbitration Notice Requirement Places Montana Law in Direct Conflict With Federal Law.

Congress enacted the FAA in order to "revers[e] centuries of judicial hostility to arbitration agreements," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974), by "plac[ing] arbitration agreements 'upon the same footing as other contracts.'" *Id.* (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 2 (1924)); *see Volt*, 489 U.S. at 474; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). In order to accomplish this overarching goal and thereby promote the "federal policy favoring arbitration," Congress "create[d] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983); *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). For transactions within its scope, the FAA requires courts "rigorously [to] enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). That obligation is binding upon federal and state courts alike. *Terminix*, 115 S. Ct. at 838-39; *Southland*, 465 U.S. at 15.



The answer to the question presented begins, of course, in the language of the FAA itself. *See Shearson/American Express*, 482 U.S. at 225. Section 2 is the "primary substantive provision" of the Act. *Gilmer*, 500 U.S. at 24. It sets forth "a congressional declaration of a liberal federal policy favoring arbitration agreements," *Moses H. Cone*, 460 U.S. at 24, and expresses Congress's intent "to mandate enforcement of all covered arbitration agreements." *Id.* at 26 n.34.

The language of Section 2 is unequivocal. A written agreement to arbitrate in any contract involving an interstate transaction is "valid, irrevocable, and enforceable" as a matter of federal law. 9 U.S.C. § 2. To that broad declaration of congressional policy confirming the validity, and requiring the enforcement, of arbitration agreements, Section 2 provides only one explicit, and explicitly limited, exception: agreements to arbitrate may be deemed unenforceable only "upon such grounds as exist at law or in equity for the revocation of *any* contract." *Id.* (emphasis added). As a matter of simple English, therefore, Section 2 permits courts to apply state laws applicable to contracts generally, but not state laws singling out arbitration agreements for disfavored treatment. *Terminix*, 115 S. Ct. at 843; *see Southland*, 465 U.S. at 16.

The Court has repeatedly confirmed this reading of Section 2. Thus, in reviewing the text of Section 2 in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court could "discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation

of any contract.'" *Id.* at 10-11 (footnote omitted). Having set out what the language of the FAA distinctly commands, the Court could "see nothing in the Act indicating that the broad principle of enforceability is subject to *any* additional limitations under state law." *Id.* at 11 (emphasis added); *see id.* at 10 ("Congress . . . withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration").

Accordingly, the Court held that a state franchise law requiring judicial consideration of disputes governed by the arbitration clause of the parties' franchise agreement "directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause." *Id.* at 10. The conflict was "direct" because the defense to arbitration found in California's franchise law was "not a ground that exists at law or in equity 'for the revocation of *any* contract,'" *id.* at 16 n.11, but rather was "a ground that exists for the revocation of arbitration provisions in contracts subject to" the state law. *Id.* California's law, therefore, failed to place arbitration agreements "'upon the same footing as other contracts, where it belongs.'" *Id.* at 16 (internal quotation marks and citation omitted); *see id.* at 17 n.11.[7]

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[7] The holding of *Southland* is especially applicable here. Like this case, *Southland* involved a national franchisor, whose standard franchise agreement required all disputes arising out of the agreement to be settled by arbitration in accordance with the rules of the American Arbitration Association. *See Southland*, 465 U.S. at 3-4. The *Southland* franchisees sued in state court alleging misrepresentations (*see id.* at 4), and in both cases, the state courts refused to enforce an agreement to arbitrate out of deference to a state statute embodying a public policy suspicious of arbitration in the particular circumstances presented. *See id.* at 20-21 (Stevens, J., dissenting in part). Moreover, *Southland* and this case raise the same generic legal issue: whether a state law, "which invalidates certain arbitration agreements covered by the Federal Arbitration Act, violates the Supremacy Clause." *Id.* at 3.



In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court again emphasized that the text of Section 2 is the *only* source of limitations on the enforceability of arbitration agreements involving interstate commerce: "An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, save upon such grounds as exist at law or in equity for the revocation of *any* contract." *Id.* at 492 n.9 (emphasis in original; citations and internal quotation marks omitted). By the express terms of that sole limitation on enforceability, state law, whether of legislative or judicial origin, is applicable only if that law governs the validity, revocability, and enforceability of contracts generally. *Id.* at 493 n.9. As this Court explained, "A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." *Id.* Therefore, the Court instructed, under Section 2

> [a] court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

*Id.*; *see Shearson/American Express*, 482 U.S. at 226.

Just last Term in *Allied-Bruce Terminix Companies v. Dobson*, 115 S. Ct. 834 (1995), this Court reaffirmed the principles established in *Southland* and *Perry*. It is true, as the Montana Supreme Court noted, that much of the opinion in *Terminix* is devoted to construing the interstate commerce language of Section 2, which is not at issue here. But *Terminix* also again made clear that Section 2 preempts state laws that single out arbitration agreements for unfavorable treatment. This Court thus restated its longstanding interpretation of Section 2:

"States may not . . . decide that a contract is fair enough to enforce its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Terminix*, 115 S. Ct. at 843. In the clearest possible terms, the Court declared that the FAA "*makes any such state policy unlawful*, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent." *Id.* (emphasis added).[8]

Both the FAA itself and the cases of this Court construing it thus establish that Section 2 directly preempts

[8] While the Montana Supreme Court saw nothing in *Terminix* relevant to this case, Justice O'Connor, in her concurrence in *Terminix*, recognized that the effect of the decision in *Terminix* would be to preempt statutes identical to the Montana notice statute:

> The reading of § 2 adopted today will displace many state statutes carefully calibrated to protect consumers, see, *e.g.*, Mont. Code Ann. § 27-5-114(2)(b) (1993) (refusing to enforce arbitration clauses in consumer contracts where the consideration is $5,000 or less), and state procedural requirements aimed at ensuring knowing and voluntary consent, see, *e.g.*, S.C. Code Ann. § 15-48-10(a) (Supp. 1993) (*requiring that notice of arbitration provision be prominently placed on first page of contract*).

115 S. Ct. at 843 (emphasis added).

Except for the Montana Supreme Court, all federal courts of appeals and state supreme courts that have considered whether the FAA preempts a state arbitration notice requirement have found preemption. *See David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 249-50 (2d Cir.), *cert. dismissed*, 501 U.S. 1267 (1991); *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1120 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990); *Webb v. R. Rowland & Co.*, 800 F.2d 803, 806-07 (8th Cir. 1986); *Collins Radio Co. v. Ex-Cell-O Corp.*, 467 F.2d 995, 997-99 (8th Cir. 1972); *Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837, 839 (Mo. 1985) (en banc); *see also King v. Postal Annex, Inc.*, No. CV-94-011-GF, slip op. at 4-6 & 6 n.5 (D. Mont. Dec. 14, 1995) (concluding that Montana Supreme Court's decision in *Casarotto* "is without merit"); *Snap-On Tools Corp. v. Vetter*, 838 F. Supp. 468, 472 (D. Mont. 1993) (Montana notice requirement preempted by FAA).



any state law that singles out arbitration agreements for disfavored treatment. Montana's law does precisely that, however. For it plainly singles out and subjects arbitration agreements to an "additional limitation[] under state law" (*Southland*, 465 U.S. at 11) that is not applicable to other contractual provisions. By its terms and as interpreted by the Montana Supreme Court, Montana's statute does not affect the validity of contracts generally; it limits enforcement only of arbitration agreements as part of a state policy disfavoring arbitration.[9] As the Montana Supreme Court candidly acknowledged, the notice statute was borne of a legislative mistrust of "a procedure as potentially inconvenient, expensive, and devoid of procedural safeguards as the one provided for by the rules of the American Arbitration Association." App. 21.[10]

[9] The notice statute, Mont. Code Ann. § 27-5-114(4) (1995), is part of the Montana Uniform Arbitration Act. However, it is a deviation from the Uniform Arbitration Act (1955), 7 U.L.A. 1 (West 1985 & Supp. 1995), which contains no notice requirement. Montana has enacted other provisions refusing to enforce arbitration in certain types of contracts, set forth in the appendix to this brief, which also are deviations from the uniform act. Montana enacted its arbitration act in 1985 in the wake of the Court's decision in *Southland*.

[10] This same anti-arbitration policy caused the Montana Supreme Court to make a second, related error: its decision to apply Montana law despite the parties' explicit contractual choice of Connecticut law. The Montana court relied on a state policy hostile to arbitration as the reason for applying Montana law to the agreement under conflict-of-laws principles and then proceeding to invalidate the agreement under that same policy. If it were not for the arbitration notice requirement that Petitioners argue is preempted by Section 2, the court below would not have reached its conclusion that the Connecticut law chosen by the parties (which has no special notice requirement) was offensive to Montana's public policy. App. 20-21. *Cf. Mastrobuono*, 115 S. Ct. at 1219 (reading choice-of-law clause in manner intended to give effect to parties' agreement to arbitrate); *Volt*, 489 U.S. at 475-76 (due regard must be given to federal policy favoring arbitration when applying general state-law principles); *id.* at 479 (parties' expectations should be enforced where it would not do "violence

In short, Montana law embodies precisely the type of focused hostility toward arbitration that Congress sought to overcome when it enacted the FAA. *Terminix*, 115 S. Ct. at 838. The Montana Supreme Court claims that the Montana notice provision is not hostile to arbitration because it does not invalidate all arbitration agreements as did the Alabama law in *Terminix*, but "simply" ensures that Montanans knowingly enter into arbitration agreements. App. 53. Section 2, however, expresses Congress's considered judgment that in light of historical antipathy toward arbitration, permitting such differential state-law treatment of arbitration agreements would "wholly eviscerate congressional intent to place arbitration agreements upon the same footing as other contracts." *Southland*, 465 U.S. at 17 n.11. This Court has consistently held, therefore, that any state policy of offering special protection to signatories of arbitration agreements that is not accorded contracts generally is directly contrary to the mandates of Section 2 and the policies underlying the FAA. *Southland*, 465 U.S. at 16 n.11; *see Perry*, 482 U.S. at 493 n.9. Section 2 requires enforcement of arbitration agreements within its scope, as the agreement here assuredly is, "notwithstanding *any* state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24 (emphasis added).

This is not to say, of course, that Montana cannot protect its citizens from the effects of contractual overreaching. Congress did not disable the states from applying general principles of unconscionability to arbitration agreements. *Terminix*, 115 S. Ct. at 843; *see Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-84 (1989). But a state may not *single out* arbitration agreements for special treatment out of a con-

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to the policies behind the FAA"). In any event, because the Montana statute is preempted by Section 2, it is not necessary for this Court to reach out and decide whether the Montana Supreme Court's conflict-of-laws analysis was independently flawed by its dependence on a statute evidencing hostility toward arbitration.



cern that those agreements in particular may be the product of unequal bargaining power. *Terminix*, 115 S. Ct. at 843. Thus, "[a]bsent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that 'would provide grounds for "the revocation of any contract,"' " the FAA mandates enforcement of the arbitration agreement. *Shearson/American Express*, 482 U.S. at 226 (quoting *Mitsubishi*, 473 U.S. at 627). By ignoring that mandate, Montana has "place[d] arbitration clauses on an unequal 'footing' " with other contract terms, "directly contrary to the Act's language and Congress's intent." *Terminix*, 115 S. Ct. at 843; *see Southland*, 465 U.S. at 15-16. Under the Supremacy Clause, therefore, Montana's statute "must give way." *Perry*, 482 U.S. at 491.

### B. *Volt* Does Not Support the Montana Supreme Court's Erroneous Interpretation of the Scope of Section 2.

In its initial opinion, the Montana Supreme Court appeared to concede that the decisions in *Southland* and *Perry*, standing alone, would require enforcement of the arbitration agreement here. App. 21-23. The court found its way around *Southland* and *Perry*, however, by construing this Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), as limiting preemption to circumstances where the state law would "undermine the goals and policies of the FAA." App. 26. Applying this approach to Section 2, the court concluded that Montana's law was consistent with the goals and policies of the FAA. App. 27-28. On remand from this Court, the Montana court confirmed that this reading of *Volt* was the sole basis for its decision that Section 2 did not preempt the Montana notice statute. *See* App. 50-53.

The Montana court's reliance on *Volt* is indefensible. To begin with, of course, the court below did just the opposite of what the state court did in *Volt*. Whereas the

state court in *Volt applied* the law chosen by the parties to the contract, the court here *refused* to honor the parties' choice-of-law clause (to the extent that clause can even be said to relate to the issue of enforceability), stating that Connecticut law was contrary to Montana's public policy embodied in the arbitration notice statute. App. 21.[11] While the state court in *Volt enforced* the parties' agreement to arbitrate, the Montana court *voided* their agreement.

As this Court recently explained in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995), *Volt* held that the FAA requires courts "to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt*, 489 U.S. at 478. In other words, the "FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties," *Mastrobuono*, 115 S. Ct. at 1216, at least when giving effect to those wishes would not do "violence to the policies behind the FAA." *Volt*, 489 U.S. at 479. Nothing in *Volt* even implies that state courts are free, as the Montana Supreme Court considered itself to be, to disregard the parties' agreement to arbitrate on the basis of a state's legislative or judicial hostility toward arbitration.

Having ignored the parties' wishes, the Montana court proceeded to make another mistake by concluding that *Volt* had narrowed the preemptive scope of Section 2. Indeed, this Court had no occasion in *Volt* even to consider the preemptive force of Section 2 with regard to the *enforcement* of arbitration agreements. Rather, *Volt* involved state rules of procedure that this Court observed were "manifestly designed to encourage resort to the

[11] The court also failed to address the parties' agreement (App. 75) to conduct the arbitration proceedings under the American Arbitration Association's Commercial Arbitration Rules, which do not impose any arbitration notice requirement. *See Mastrobuono*, 115 S. Ct. at 1218.



arbitral process." *Volt*, 489 U.S. at 476; *see id.* at 472, 474. The state rules in that case did not render the parties' agreement unenforceable; the rules affected only the timing of the arbitration. *See id.* at 479.

By misusing *Volt*, the Montana Supreme Court sought to grant itself a license to ignore the express requirements of Section 2 and to make its own case-by-case determination whether a particular state law "undermines" the FAA's goals. The court purported to base that authority (App. 27) on the statement by this Court that the FAA does not "occupy the entire field of arbitration." *Volt*, 489 U.S. at 477. But in *Volt*, this Court looked to whether the state procedures in question "would undermine the goals and policies of the FAA" only because the FAA had not "displaced state regulation in [the] area" governed by the state rules. *Id.* at 477-78.[12] While the FAA might be silent about the procedural situation presented in *Volt*, Section 2 speaks in the clearest possible terms to the circumstances under which an agreement to arbitrate must be enforced. *Terminix*, 115 S. Ct. at 843; *Perry*, 482 U.S. at 489-90; *Southland*, 465 U.S. at 10-11, 16. Therefore, state laws that place arbitration agreements "on an unequal 'footing' " by *definition* undermine the goals of the FAA. *Terminix*, 115 S. Ct. at 843; *see also Mastrobuono*, 115 S. Ct. at 1216 (FAA ensures

[12] As described by the Court, the conflict with federal law asserted in *Volt* was not with Section 2 of the FAA, but with Sections 3 and 4, which provide the procedural mechanisms to enforce the substantive rights conferred by Section 2 and which, according to the Court, do not "confer a right to compel arbitration . . . at any time." *Id.* at 474, 476-77; 9 U.S.C. §§ 3, 4. Moreover, unlike the California rules, "the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate." *Id.* at 476 n.5. Because the procedural question before the Court in *Volt* was not addressed by the FAA, the California state court's interpretation of the contract as incorporating state rules of arbitration did not impermissibly conflict with the FAA. *Id.* at 477-78.

enforcement of agreement to arbitrate punitive damages claims "even if a rule of state law would otherwise exclude such claims from arbitration").

Nothing in *Volt* itself, therefore, detracts from the holdings in *Southland* and *Perry* that under Section 2 of the FAA, parties may be assured that their agreement to arbitrate will be enforced. *See Terminix*, 115 S. Ct. at 838-39. Indeed, both the Second and First Circuits have found preemption of arbitration notice requirements similar to Montana's *after* the decision in *Volt*. *See David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 249-50 (2d Cir.), *cert. dismissed*, 501 U.S. 1267 (1991); *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1120 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990). The First Circuit correctly distinguished *Volt* on the ground that, unlike the arbitration notice requirement, the California rules applied in *Volt* "did not impinge on the validity or enforceability of the arbitral contract." *Connolly*, 883 F.2d at 1119 n.3.[13] Even after *Volt*, therefore, Section 2 must still be read to preempt state laws, like the Montana law, that make an arbitration agreement unenforceable even though another type of agreement would be held valid.

[13] In *Saturn Distribution Corp. v. Williams*, 905 F.2d 719, 723-27 (4th Cir.), *cert. denied*, 498 U.S. 983 (1990), the Fourth Circuit considered and rejected the same argument accepted by the Montana Supreme Court: "the notion . . . that the [state] statute may be harmonized with the FAA because it only ensures 'consensual rather than forced arbitration.'" *Id.* at 726 (quoting *Saturn Distribution Corp. v. Williams*, 717 F. Supp. 1147, 1151 (E.D. Va. 1989)). The Fourth Circuit concluded that *Volt* "is not to the contrary." *Id.*; *see also Dowd v. First Omaha Sec. Corp.*, 495 N.W.2d 36, 41 (Neb. 1993).



## II. THE MONTANA SUPREME COURT'S DECISION THREATENS TO DISRUPT THE NATIONAL POLICY OF ENFORCING ARBITRATION AGREEMENTS.

The decision below is not only contrary to the express terms of Section 2, the teachings of this Court, and the holdings of every federal court of appeals and state supreme court to have addressed the issue, but also, if affirmed, the decision would seriously disrupt the national uniformity that Congress sought to achieve when it chose to put arbitration agreements on the same footing as other contracts. Arbitration agreements like the one in this case have flourished nationwide as a chosen means of resolving disputes in a wide array of business and consumer contexts. Financial institutions, franchisors, distributors, manufacturers, and a multitude of other companies conducting interstate businesses now regularly include standard arbitration provisions in their contracts. *See generally* Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 Hofstra L. Rev. 385, 429-54 (1992). The case law on arbitration notice requirements alone illustrates the degree to which national and international economies have come to rely on arbitration in a host of circumstances. *See, e.g., Threlkeld*, 923 F.2d at 246-47 (contract between member of foreign commodities exchange and American trader); *Connolly*, 883 F.2d at 1116 (customer agreement with securities broker); *Webb*, 800 F.2d at 804-05 (same); *Collins*, 467 F.2d at 996 (purchase agreement between manufacturer and its parts supplier); *Bunge*, 685 S.W.2d at 838 (commercial contract for bulk purchase of soybeans); *King v. Postal Annex, Inc.*, No. CV-94-011-GF, slip op. at 2 (D. Mont. Dec. 14, 1995) (franchise agreement); *Snap-On Tools Corp. v. Vetter*, 838 F. Supp. 468, 472 (D. Mont. 1993) (dealership agreement).

Thus, the FAA is, as it was intended, serving to foster a "federal policy favoring arbitration" in a variety of

business and consumer settings. *Moses H. Cone*, 460 U.S. at 24; *see Shearson/American Express*, 482 U.S. at 226; *Perry*, 482 U.S. at 489. The setting of this case is a prime example of the potential benefits of arbitration. A franchise agreement typically involves a continuing business relationship in which disputes can, from time to time, occur. Arbitration is therefore favored by *both* franchisors and franchisees as an effective and efficient means of resolving disputes in that ongoing relationship. *See* Amici Curiae Brief of International Franchise Association and Securities Industry Association at 1-2. Arbitration " 'minimiz[es] hostility and is less disruptive of ongoing and future business dealings among the parties' " than litigation in the courts. *Terminix*, 115 S. Ct. at 843 (quoting H.R. Rep. No. 97-542, at 13 (1982)). Arbitration also "avoid[s] 'the delay and expense of litigation,' " and therefore "appeal[s] 'to big business and little business alike, . . . corporate interests [and] . . . individuals.' " *Id.* at 842 (quoting S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924)).

It is thus of particular importance that parties to arbitration agreements like the one here be assured that their agreements are enforceable, regardless of whether a particular state is receptive or hostile to arbitration. But the Montana Supreme Court's decision creates new uncertainty in the law that threatens to undermine Congress's support of arbitration as an alternative device for dispute resolution. By formulating a public policy based on the perception that arbitration improperly dispenses with procedural safeguards, see App. 20-21, Montana has sought to resurrect historical misconceptions about arbitration that have long since been rejected by this Court. As this Court has declared, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals [may] inhibit[] the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27



(1985).[14] More than once, the Court has rebuffed efforts to categorize arbitral tribunals as inadequate alternatives to courts, noting that the FAA and the rules of procedure of major arbitral tribunals similar to the American Arbitration Association adequately protect against biased or incompetent arbitrators and offer parties a fair opportunity to present their claims. *Gilmer*, 500 U.S. at 30-31; *Shearson/American Express*, 482 U.S. at 231-33.[15] The Court has recognized that arbitration does not require a party to "forgo [its] substantive rights"; it only "trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628.[16]

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[14] The Montana Supreme Court's initial opinion, however, barely disguises its disdain for arbitration, an antipathy that surfaces clearly in the special concurrence penned by the author of the court's opinion. Justice Trieweiler scolded federal courts for their "naive assumption that arbitration provisions are bargained for," App. 30, and appealed to them to understand that arbitration agreements "subvert our system of justice as we have come to know it." App. 32. That concurring opinion is as vivid a reminder as one can imagine of the hostility toward arbitration that Congress addressed in the FAA.

[15] The commercial rules of the American Arbitration Association, which the parties here chose to govern their arbitration, contain ethical provisions applicable to the parties and arbitrators alike and numerous procedural provisions. *See* Martin Domke, 2 *Domke on Commercial Arbitration* App. VII(A) (rev. ed. 1995).

[16] Montana also looks with disfavor on arbitration agreements because they may, as here, require travel to other states. *See* App. 20-21. Yet this Court has dismissed the argument that a policy of focusing the resolution of disputes in one forum is unfair. To the contrary, the Court has underscored the potential benefits of such a policy, even when implemented as part of a nonnegotiable forum selection clause in a standard-form consumer contract. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991); *see also Stewart Organization Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring); *Southland*, 465 U.S. at 7; *Scherk*, 417 U.S. at 518-19; *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17-18 (1972).

The rule of law announced by the Montana Supreme Court is disruptive and unworkable for anyone transacting business in interstate commerce. The decision below does not take into account the varying, even conflicting, arbitration laws that exist from state to state and their impact on interstate commerce. State arbitration notice provisions are far from uniform. Montana and three other states impose different notice requirements for contracts subject to an agreement to arbitrate.[17] At least six additional states have enacted differing laws regulating the notice, placement or acknowledgment of arbitration agreements within certain kinds of contracts; California added four such statutes in 1994.[18] Furthermore, numerous

[17] Mo. Ann. Stat. § 435.460 (Vernon 1992) (notice that contract contains arbitration agreement must be placed adjacent to signature block in ten-point capital letters); S.C. Code Ann. § 15-48-10(a) (Law. Co-op. Supp. 1995) (notice that contract is subject to arbitration shall be typed in underlined capital letters or rubber-stamped prominently on first page of contract); Vt. Stat. Ann. tit. 12, § 5652(b) (Supp. 1995) (parties must sign written acknowledgment of arbitration that contains language provided in statute and that is prominently displayed in contract).

[18] Cal. Bus. & Prof. Code § 7191 (West 1995) (arbitration provision in contracts for work on residential property is unenforceable unless printed in certain type and unless accompanied by specified notice before signature line); Cal. Health & Safety Code § 1363.1 (West Supp. 1996) (health care service plans requiring binding arbitration must include a disclosure of arbitration in particular terms and in particular location in contract); Cal. Ins. Code § 10123.19 (West Supp. 1996) (similar requirement for disability insurance policies); Cal. Ins. Code § 11512.33 (West Supp. 1996) (similar requirement for nonprofit hospital service plans); Ga. Code Ann. § 9-9-2(c)(8), (9) (Michie Supp. 1995) (arbitration provisions in residential real estate contracts and employment contracts must be separately initialed at the time of contract's execution); Iowa Code Ann. § 679A.1(2)(c) (West 1987) (agreement to arbitrate tort claims must be in separate writing executed by parties); R.I. Gen. Laws § 10-3-2 (Supp. 1995) (arbitration provisions in insurance contracts must be placed immediately above parties' signatures); Tenn. Code Ann. § 29-5-302(a) (Supp. 1995) (arbitration clause in contracts relating to farm or residential



states have placed other conditions on agreements to arbitrate that do not apply to contracts generally. Montana, for example, refuses to enforce arbitration agreements in certain types of contracts where the consideration is $5,000 or less. Mont. Code Ann. § 27-5-114(2)(b) (1995) (reprinted in the Appendix to this brief), *cited in Terminix*, 115 S. Ct. at 843 (O'Connor, J., concurring).[19]

The results of Montana's interpretation of the FAA are evident in this case. The parties legally bound themselves to arbitrate all disputes arising under their franchise agreement. They chose Connecticut law to govern that agreement. Nonetheless, under the decisions of the Montana Supreme Court, the parties have lost the benefit of their agreement to arbitrate because of a state-law principle

property must be separately signed or initialed by parties); Tex. Civ. Prac. & Rem. Code Ann. § 171.001(b) (West Supp. 1996) (excluding from arbitration act any contract by an individual person for acquisition of property or services where consideration is $50,000 or less unless parties agree in writing to submit to arbitration and such agreement is signed by parties *and* their attorneys); Tex. Civ. Prac. & Rem. Code Ann. § 171.001(c) (West Supp. 1996) (personal injury claims excluded from scope of arbitration act except upon advice of counsel to both parties as evidenced by written agreement signed by counsel to both parties). Before September 1, 1995, the Texas provisions were found at Tex. Rev. Civ. Stat. Ann. art. 224(b), (c).

[19] A state-law exclusion from arbitration for small transactions would exclude a significant percentage of disputes that are now subject to arbitration. "[A]ccording to the American Arbitration Association . . ., more than one-third of its claims involve amounts below $10,000 . . . ." *Terminix*, 115 S. Ct. at 843. Georgia similarly excludes from enforcement under its arbitration act any agreement to arbitrate relating to insurance contracts, loan agreements and consumer financing agreements involving $25,000 or less, as well as all contracts involving consumer transactions. Ga. Code Ann. § 9-9-2(c) (Michie Supp. 1995). Similar limitations on the enforceability of arbitration agreements can be found in many states' laws. *See* Strickland, *supra*, at 402 n.98 (citing statutes from 13 different states); *see also Mastrobuono*, 115 S. Ct. at 1215 (New York law barring awards of punitive damages in arbitration).

that no party anticipated would ever be applied to their agreement. A company doing business nationally cannot know in what state it might be sued and—after the decision below—which state's arbitration notice statute it ought to have complied with when entering into an agreement.[20] Although Section 2 of the FAA does subject parties to state laws governing contracts generally, Congress sought by enacting the FAA to remove state-imposed, arbitration-specific impediments to the parties' efforts to arbitrate their disputes because such differential state-law treatment of arbitration would undermine the "declared . . . national policy favoring arbitration." *Southland*, 465 U.S. at 10.[21]

By erecting an additional obstacle to enforcing agreements to arbitrate, Montana has violated the express terms

[20] Missouri requires notice adjacent to the signature block, while Montana requires notice on the first page of the contract. *See* Mo. Ann. Stat. § 435.460 (Vernon 1992); Mont. Code Ann. § 27-5-114(4) (1995). So, for example, if the parties selected Missouri law to govern their contract and they complied with Missouri's notice statute as a protective measure in the event a court construed the choice-of-law clause to incorporate Missouri's arbitration-specific laws, the contract would still not be subject to arbitration if a Montanan brought suit on the contract in Montana state court, as that court would apply Montana's notice statute as a fundamental public policy. *See* App. 21.

[21] Other state courts have applied their state's arbitration notice statute to the case before them, but those decisions made no mention of the FAA or preemption, presumably because no party contended that the arbitration agreement involved interstate commerce. *E.g., Hefele v. Catanzaro*, 727 S.W.2d 475 (Mo. Ct. App. 1987); *A.C. Beals Co. v. Rhode Island Hosp.*, 292 A.2d 865 (R.I. 1972); *Joder Bldg. Corp. v. Lewis*, 569 A.2d 471 (Vt. 1989). At the same time, some state courts have found their own state's notice statutes preempted by the FAA. *E.g., McCarney v. Nearing, Staats, Prelogar & Jones*, 866 S.W.2d 881, 887-88 (Mo. Ct. App. 1993), *transfer denied* (Mo. Jan. 25, 1994); *Woermann Constr. Co. v. Southwestern Bell Tel. Co.*, 846 S.W.2d 790, 792-93 (Mo. Ct. App. 1993); *Godwin v. Stanley Smith & Sons*, 386 S.E.2d 464, 467 (S.C. Ct. App. 1989).



of Section 2 and disrupted the national uniformity that Congress sought to ensure when it made arbitration agreements "valid, irrevocable, and enforceable" as a matter of federal law. 9 U.S.C. § 2. Accordingly, this Court should hold that the Montana notice law is preempted by the FAA. "Having made the bargain to arbitrate, the part[ies] should be held to it . . . ." *Mitsubishi*, 473 U.S. at 628.

## CONCLUSION

The judgment of the Supreme Court of Montana should be reversed. The case should be remanded with instructions to reinstate the Montana district court's order staying the plaintiffs' claims "until the arbitration has been had in accordance with the terms of the arbitration agreement." App. 11.

Respectfully submitted,

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# APPENDIX

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## STATUTE INVOLVED

### Section 27-5-114, Montana Code Annotated

27-5-114. Validity of Arbitration agreement—exceptions. (1) A written agreement to submit an existing controversy to arbitration is valid and enforceable except upon such grounds as exist at law or in equity for the revocation of a contract.

(2) A written agreement to submit to arbitration any controversy arising between the parties after the agreement is made is valid and enforceable except upon such grounds as exist at law or in equity for the revocation of a contract. Except as permitted under subsection (3), this subsection does not apply to:

(a) claims arising out of personal injury, whether based on contract or tort;

(b) any contract by an individual for the acquisition of real or personal property, services, or money or credit where the total consideration to be paid or furnished by the individual is $5,000 or less;

(c) any agreement concerning or relating to insurance policies or annuity contracts except for those contracts between insurance companies; or

(d) claims for workers' compensation.

(3) A written agreement between members of a trade or professional organization to submit to arbitration any controversies arising between members of the trade or professional organization after the agreement is made is valid and enforceable except upon such grounds as exist at law or in equity for the revocation of a contract.

(4) Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.